

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY BERNARD GRAY,

Defendant-Appellant.

UNPUBLISHED

November 13, 2008

No. 281696

Genesee Circuit Court

LC No. 02-009483-FH

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

In 2002, defendant pleaded no contest to third-degree home invasion, MCL 750.110a(4), and attempted assault with a dangerous weapon, MCL 750.82 and MCL 750.92(2). The trial court sentenced defendant to serve 24 months' probation, the first 180 days to be served in jail, with credit for 84 days' served. Upon his fifth violation of probation, the trial court revoked probation and imposed concurrent prison sentences of 30 to 60 months for home invasion, and 16 to 24 months for attempted assault. The recommended range for the minimum sentence for home invasion under the sentencing guidelines came to zero to nine months. Defendant now challenges that sentencing departure by delayed leave granted. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The offenses underlying this case stemmed from defendant entering a residence without permission and assaulting a rival for a woman's affections. From late 2002 until early 2007, defendant violated probation four times, by failing to report and testing positive for cocaine. Defendant spent most of that probationary period on absconder status. But probation was continued each time, the conditions ultimately including that defendant be placed on electronic surveillance. Defendant was then arrested for failure to abide by that condition, and, according to the probation violation report, also for breaking and entering the home of, and assaulting, an elderly man.

At sentencing, defendant admitted that he had failed to get his drug problem under control. The trial court stated as follows:

I'm not sure why I've been that tolerant, but in any event he did appear to have problems that we could probably work with in the community and we've tried that. And . . . the Court had ordered him to be on electronic supervision and work on his drug addiction in the community. But that didn't work out. He didn't

appear at his residence for the hook-up [a]nd . . . thereafter he was unavailable. Unknown whereabouts. And he was most recently apparently arrested by Flint Police on other matters

So, I do think we've exhausted all community based placement options. And I think his record speaks for itself. No one could predict at the time I originally sentenced [defendant] that he was gonna be in and out of here like this with five violation[s] and poor adjustment to community based placement.

* * *

[T]he Court finds substantial and compelling reasons to depart upwards based on his poor performance; particularly recently when we tried to work on a tether and drug treatment in the community and not even be home for the hook-up to tether and not available . . . for two months when he was finally arrested

A sentencing court departing from the guidelines must state on the record its reasons for the departure, and may deviate for only a "substantial and compelling reason . . ." MCL 769.34(3). See also *People v Babcock*, 469 Mich 247, 255-256, 272; 666 NW2d 231 (2003). This legislative language, in light of its statutory and caselaw history, indicates the legislative intent that deviations from sentencing recommendations follow from only objective and verifiable factors. *Id.* at 257-258, 272.

In reviewing a decision whether to depart from the recommended range under the guidelines, "whether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion . . ." *Id.* at 266.

An abuse of discretion occurs where the trial court chooses an outcome falling outside a "principled range of outcomes." *Id.* at 269. Defendant argues that the departure in this instance fell outside the principled range of outcomes on the ground that nothing in the facts of the case suggests that he deserved any greater punishment than the "average" third-degree home invader. However, the sentencing court was not limited to the facts of that original crime, but had discretion to consider defendant's conduct while on probation. See *People v Hendrick*, 472 Mich 555, 557, 562-563; 697 NW2d 511 (2005). Moreover, "any probation violation represents an affront to the court and an indication of an offender's callous attitude toward correction and toward the trust the court has granted the probationer," and thus can in and of itself constitute a substantial and compelling, objective and verifiable, reason for a departure. *People v Schaafsma*, 267 Mich App 184, 185-186; 704 NW2d 115 (2005).

In this case, defendant demonstrated that callous attitude toward the court, and its efforts to guide him from his aggressive and substance-abusing tendencies, five times. The court thus had before it a situation that was indeed more serious than the original home invasion. In light of defendant's several probation violations, we do not deem the trial court's decision to impose a

minimum sentence 21 months beyond the recommended range under the guidelines as falling outside the range of principled outcomes.

Affirmed.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis